

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
	)	
Robert Kerivan	)	
and Bridgeview Vineyards, Inc.	)	ADMINISTRATIVE COMPLAINT
	)	
Josephine County, Oregon	)	
	)	Docket No. CWA-10-2003-0012
Respondents	)	
_____	)	

**STATUTORY AUTHORITY**

1. This Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 309(g) of the Clean Water Act (“the Act”), 33 U.S.C. § 1319(g). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 10, who in turn has redelegated this authority to the Director of the Office of Ecosystems, Tribal and Public Affairs (“Complainant”).

2. Pursuant to Section 309(g)(2)(B) of the Act, and in accordance with 40 C.F.R. Part 22, the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (“Part 22 rules”) Complainant hereby proposes the assessment of a civil penalty against Robert E. Kerivan, owner of Bridgeview Vineyards, Inc.. (“Respondents”)

for the unlawful discharge of dredged and/or fill material into navigable waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), without authorization by an Army Corps of Engineers (“Corps”) permit as required by Section 404 of the Act, 33 U.S.C. § 1344.

Complainant also hereby provides notice of Respondent’s opportunity to request a hearing on the proposed penalty assessment.

### **ALLEGATIONS**

3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of dredged or fill material into navigable waters of the United States, except in compliance with a permit issued by the Corps under Section 404 of the Act.

4. Respondent is an individual who, at the time of the alleged violation, was the owner and operator of Bridgeview Vineyards and Winery, Inc., which is currently listed as an active corporation by the Oregon Secretary of State. Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

5. Upon information and belief, during November 2002, and at times more fully known to Respondent, Respondent and/or persons acting on his behalf, engaged in mechanized filling resulting in the discharge of dredged and/or fill material into waters of the United States (Sucker Creek) at Bridgeview Vineyards, 4210 Holland Loop Road in Cave Junction, Josephine County, Oregon while preparing the property for a residential development. This property is hereinafter referred to as “the Site.” The Site lies adjacent to the lower end of Sucker Creek.

6. Sucker Creek is a tributary to the East Fork of the Illinois River. The East Fork of the Illinois River is a “navigable waters” and a “waters of the United States” within the

meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2.

7. The Site also contains areas which meet the definition of a “special aquatic site” under 40 C.F.R. § 230.3(q-l) of EPA’s 404(b)(1) Guidelines for Specification of Disposal Sites of Dredged or Fill Material. The “special aquatic site” areas on the Site in which Respondents placed materials or conducted fill include, but are not limited to:

a. Riffle and pool complexes of Sucker Creek located below the ordinary high water level, and

b. vegetated wetlands adjacent to and within the floodplain of Sucker Creek.

8. Upon information and belief, Respondent and/or persons acting on his behalf, used heavy equipment to place the fill material into the active channel and floodplains of Sucker Creek. The heavy equipment Respondent used to place fill material within Sucker Creek, is a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

9. The fill material discharged by Respondent and/or persons acting on his behalf includes dirt, rock, and gravel, each of which constitutes a “pollutant” within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

10. By causing such fill material to enter waters of the United States, Respondent engaged in the “discharge of pollutants” from a point source within the meaning of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

11. Respondent’s discharge of fill material was not authorized by any permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1312 or 1314, and Respondent is

therefore in violation of Section 301 of the Act, 33 U.S.C. § 1311.

12. Each day the material remains in the waters of the United States without the required permit constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

13. Under Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties in an amount not to exceed \$11,000 per day per violation, up to a maximum of \$137,500.

14. Pursuant to Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), EPA has consulted with the State of Oregon concerning this matter.

#### **PROPOSED PENALTY**

15. Based on the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(B) of the Act, Complainant proposes that the Presiding Officer assess an administrative penalty against Respondent in the amount of \$25,000. Complainant's proposed penalty is based on the applicable statutory penalty factors in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). These are: the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to Respondent's ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

16. The nature, circumstances, extent, and gravity of the violation in this case is determined to be moderate. Respondent using heavy equipment to move native materials from within the creek and adjacent floodplain/wetlands to create a 300 foot gravel berm that blocked

flows from the natural channel and redirected them to a new channel that the Respondent created through a former gravel bar. The removal and subsequent replacement of stream gravels materials and large boulders by heavy equipment to create the channel blocking berm and form a new channel was done in a manner that caused both turbidity-laden return waters and fine sediments/gravels to be reintroduced into the stream. Intact riparian vegetation has also removed or buried during the channel relocation activities. Sucker Creek is used by Southern Oregon/Northern California coho salmon for spawning and was designated as critical habitat on May 5, 1999. Most west coast coho salmon enter rivers in October and spawn from November to December and occasionally into January. This constructed berm created an obstacle for migrating adults that are currently moving through the stream system to spawn and may have resulted in smothering some existing coho salmon redds (nests) located downstream

17. Respondent is culpable because he mechanically altered the stream channel of Sucker Creek, which is a water of the United States, without a Section 404 permit, even though he was aware of the requirement to obtain the permit prior to discharging fill material to waters of the United States.

18. Complainant is not aware of any history of prior federal violations by this Respondent.

19. Respondent has enjoyed economic benefit as a result of his failure to comply with the Act, by delaying costs associated with making application for a 404 permit for stream bank protection work.

20. Respondent has presented no evidence to EPA that he is currently unable to pay

the proposed penalty. Therefore, EPA presumes that Respondent is able to pay a penalty of \$25,000. If Respondent submits information to rebut this presumption, Complainant will review this information to determine whether the proposed penalty is appropriate.

### **OPPORTUNITY TO REQUEST A HEARING**

21. Respondent has the right to file an Answer requesting a hearing on any material fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon request, the Presiding Officer may hold a hearing for the assessment of these civil penalties, conducted in accordance with the provisions of the Part 22 Rules and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.

22. Respondent's Answer, including any request for hearing, must be in writing and must be filed with:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, ORC-158  
Seattle, Washington 98101

23. If Respondent requests a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. If Respondent does not request a hearing, EPA will issue a final order assessing administrative penalties and any members of the public who commented on this proposed assessment during the thirty (30) day period following Respondent's receipt of this document will have an additional thirty (30) days to petition EPA to

set aside the final order assessing administrative penalties and to request EPA to hold a hearing thereon.

### **FAILURE TO FILE AN ANSWER**

24. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days after service of this Complaint, unless Respondent requests and receives an extension of time to file the Answer.

25. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondent intends to place at issue; and (3) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegation contained herein constitutes an admission of the allegation.

### **INFORMAL SETTLEMENT CONFERENCE**

26. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settling this matter. To request such a settlement conference, Respondent should contact:

Deborah Hilsman  
Assistant Regional Counsel  
U.S. Environmental Protection Agency

Region 10  
1200 Sixth Avenue, ORC-158  
Seattle, Washington 98101  
Telephone: (206) 553-1810  
FAX: (206) 553-0163

27. Note that a request for an informal settlement conference does not extend the thirty (30) day period for filing a written Answer to this Complaint, nor does it waive Respondent's right to request a hearing.

28. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), shall affect Respondent's continuing obligation to comply with the Clean Water Act, with every term and condition of any applicable Corps permit, and with any separate compliance order issued to Respondent under Section 309(a) of the Act, 33 U.S.C. § 1319(a), concerning the violations alleged herein.

29. Respondent is advised that, after the Complaint is issued, the Consolidated Rules prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, Environmental Appeals Board Member, Administrative Law Judge, or any person likely to advise these officials in the decision of this case.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2005.



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Michelle Pirzadeh, Director  
Office of Ecosystems, Tribal and Public Affairs  
EPA Region 10

**CERTIFICATE OF SERVICE**

I hereby certify that the original of the foregoing Administrative Complaint against Robert E. Kerivan, Docket No. CWA-10-2002-0012, was filed with the Regional Hearing Clerk, EPA Region 10, Seattle, Washington, and a true and correct copy of such Complaint, together with a copy of the Consolidated Rules of Practice at 40 C.F.R. Part 22, the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, and the Small Business Regulatory Enforcement and Fairness Act Information Sheet was placed in the United States mail, postage prepaid, certified mail, return receipt requested, on this \_\_\_\_\_ day of \_\_\_\_\_, 2005, addressed to the following:

Robert E. Kerivan.  
Bridgeview Vineyards, Inc.  
4210 Holland Loop Road  
Cave Junction, OR 97523

\_\_\_\_\_  
Date